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AZIZAN YAHAYA

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: K-05-485-2010]

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13 JULY 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,147.3g of cannabis - Appeal against conviction and sentence - Drugs found in room occupied by appellant and his wife -*

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Room accessible to other occupants of house - Whether prosecution's failure to call appellant's three children as witnesses fatal - Judge's finding on appellant's demeanour made without supporting reasons - Failure of prosecution to exclude possibility of access by other persons - Failure to establish exclusive custody and control - Failure to make affirmative

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finding of possession - Whether conviction unsafe

On 15 June 2008 at about 3.15am, a police party led by SP5 went to a house occupied by the appellant, his wife (SP4) and their three children. The appellant's son opened the door for SP5

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and his team to enter the house. SP5 and his team went to the main bedroom on the upper floor where the appellant and SP4 were asleep. Upon searching the house, the police found cannabis in a bag kept in a drawer in the headboard of the appellant's bed. The other rooms occupied by the appellant's children were not

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searched. The appellant was charged with the offence of trafficking in 1,147.3g of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). The appellant's defence was a denial of the charge. The appellant testified that it was normal for his room to be unlocked and his children had access to the room. He

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denied knowledge of the bag in the bed's headboard. The appellant was found guilty, convicted and was sentenced to death. The appellant appealed against his conviction and sentence on the following grounds namely, (i) the judge's failure to direct his mind to the prosecution's failure to call the appellant's three children as

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witnesses; (ii) the judge's finding that the appellant's demeanour at the time of his testimony raised suspicion; and (iii) the judge's failure to make an affirmative finding of possession of the incriminating drugs.

Held (allowing appeal and setting aside the conviction and sentence)
Per Aziah Ali JCA delivering the judgment of the court:

(1) The room where the drugs were found was accessible to all the other occupants in the house. The room was unlocked. SP4 and the appellant's children had access to the room yet SP4 was not charged although she was remanded. The prosecution failed to discharge its bounden duty of excluding access to the appellant's room by others. (paras 8-9)

(2) The failure to call the appellant's children as witnesses would not have had a material effect on the prosecution's case. It was reasonable to assume that had the children been called their testimonies regarding access to the room would in all probability be similar to SP4's evidence that the room was accessible to all occupants in the house. (para 11)

(3) The learned judge's finding on the demeanour of the appellant was one of the factors that weighed on his decision to convict the appellant but it was a finding that was arrived at with no supporting reasons. A conclusion arrived at in the absence of reasons raises the possibility that the learned judge may not have considered the weight of evidence and the possibilities of the case in coming to his ultimate decision; *Balasingham v. Public Prosecutor* (refd). (para 13)

(4) The onus was on the prosecution to exclude, at the very least, the possibility of access by other persons to the drawer, if not the room, and that only the appellant and no other person had exclusive access and use of the drawer. The onus was not on the defence to prove possibility of access to the drawer by others. The learned judge had failed to consider that the prosecution had failed to exclude the possibility that other individuals could not have had access to the drawer. (para 16)

(5) The mere fact that the drugs were found in the drawer on the appellant's side of the bed was insufficient for the learned judge to make an inference that the appellant had exclusive custody and control over the bag. The failure on the part of the learned judge to properly consider and evaluate the evidence coupled with His Lordship's failure to make an affirmative finding of possession was a serious misdirection in law. (para 17)

(6) The prosecution had failed to prove beyond a reasonable doubt that the appellant had custody or control of the bag containing the drugs in question for the presumption under s. 37(da) of the Act to be invoked. The appellant ought not to have been called to enter his defence. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Pada 15 Jun 2008, kira-kira jam 3.15 pagi, pasukan polis yang diketuai oleh SP5 telah ke rumah yang dihuni oleh perayu, isterinya ('SP4') dan tiga orang anak-anak mereka. Anak lelaki perayu telah membuka pintu untuk SP5 dan pasukannya untuk memasuki rumah. SP5 dan pasukannya pergi ke bilik tidur utama di tingkat atas di mana perayu dan SP4 sedang tidur. Apabila rumah tersebut digeledah, pihak polis menjumpai ganja dalam beg yang disimpan di dalam laci pada kepala katil perayu. Bilik-bilik lain yang diduduki oleh anak-anak perayu tidak digeledah. Perayu didakwa mengedar 1,147.3 gram ganja di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pembelaan perayu adalah penafian terhadap pertuduhan tersebut. Perayu telah memberi keterangan bahawa adalah menjadi kebiasaan untuk biliknya tidak dikunci dan anak-anaknya mempunyai akses kepada bilik tersebut. Dia menafikan mempunyai pengetahuan mengenai beg di kepala katil tersebut. Perayu didapati bersalah dan disabitkan kesalahan dan dijatuhkan hukuman mati. Perayu merayu terhadap sabitan dan hukuman tersebut atas alasan-alasan berikut: (i) kegagalan hakim untuk mengarahkan fikirannya kepada kegagalan untuk memanggil ketiga-tiga anak perayu sebagai saksi-saksi pendakwaan; (ii) dapatan hakim bahawa sikap perayu ketika dia memberi keterangan membangkitkan syak; dan (iii) kegagalan hakim untuk membuat dapatan afirmatif mengenai milikan dadah terlarang tersebut.

Diputuskan (membenarkan rayuan dan mengenepikan sabitan dan hukuman)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Bilik di mana dadah tersebut ditemui boleh diakses oleh kesemua penghuni-penghuni lain di dalam rumah tersebut. Bilik tersebut tidak dikunci. SP4 dan anak-anak perayu mempunyai akses kepada bilik tersebut namun SP4 tidak didakwa walaupun dia ditahan reman. Pihak pendakwaan gagal untuk menjalankan tanggungjawabnya dalam menghalang akses kepada bilik perayu oleh orang lain.

(2) Kegagalan untuk memanggil anak-anak perayu sebagai saksi tidak akan mempunyai kesan material ke atas kes pendakwaan. Ia adalah munasabah untuk menganggap bahawa jika kesemua kanak-kanak tersebut dipanggil untuk memberi keterangan mengenai akses, keterangan mereka berkemungkinan sama dengan keterangan SP4 bahawa bilik tersebut boleh diakses oleh kesemua penghuni-penghuni di rumah tersebut.

(3) Dapatan hakim mengenai sikap perayu adalah salah satu faktor yang dipertimbangkan dalam keputusannya untuk mensabitkan perayu tetapi ia adalah suatu dapatan yang dibuat tanpa alasan-alasan yang menyokong. Kesimpulan yang dicapai tanpa alasan-alasan menimbulkan kemungkinan bahawa hakim mungkin tidak mempertimbangkan berat bukti dan kemungkinan kes tersebut dalam membuat keputusan muktamad; *Balasingham v. Public Prosecutor* (dirujuk).

(4) Tanggungjawab adalah pada pihak pendakwaan untuk mengecualikan, sekurang-kurangnya, kemungkinan akses oleh orang lain kepada laci tersebut, jika tidak bilik tersebut, dan bahawa hanya perayu dan tiada orang lain yang mempunyai akses dan menggunakan laci secara eksklusif. Tanggungjawab tidak terletak pada pihak pendakwaan untuk membuktikan kemungkinan akses kepada laci-laci tersebut oleh orang lain. Hakim telah gagal untuk mempertimbangkan bahawa pihak pendakwaan telah gagal untuk mengecualikan kemungkinan bahawa individu-individu lain tidak boleh mempunyai akses kepada laci.

(5) Fakta bahawa dadah tersebut ditemui di dalam laci di sebelah katil perayu adalah tidak mencukupi bagi hakim untuk membuat kesimpulan bahawa perayu mempunyai jagaan dan kawalan eksklusif ke atas beg tersebut. Kegagalan di bahagian hakim untuk mempertimbangkan dan menilai bukti ditambah lagi dengan kegagalan untuk membuat dapatan afirmatif mengenai milikan merupakan satu salah arahan undang-undang.

(6) Pihak pendakwaan telah gagal untuk membuktikan melampaui keraguan yang munasabah bahawa perayu mempunyai jagaan atau kawalan beg yang mengandungi dadah tersebut untuk membangkitkan anggapan di bawah s. 37(da) Akta. Perayu tidak sepatutnya dipanggil untuk membela diri.

Case(s) referred to:
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 HC ***(refd)***
Shah Rizan Sulong lwn. PP [2012] 1 LNS 339 CA ***(refd)***
Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 2, 37(da)(vi), 39B(1)(a)

For the appellant - Ahmad Nizam Mohamed; M/s Nizam & Rofi
For the respondent - Aslinda Ahad DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: 45A-28-2009]

Reported by Amutha Suppayah

JUDGMENT

Aziah Ali JCA:

[1] The appellant, Azizan Yahaya was charged with trafficking in 1,147.3g of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). He was found guilty and convicted by the Alor Setar High Court and was sentenced to death. The appellant appealed to this court against his conviction and sentence. We heard the appeal and unanimously allowed his appeal and set aside the conviction and sentence.

[2] Briefly the evidence adduced by the prosecution was that on 15 June 2008 at about 3.15am a police party led by SP5, Insp. Faroukh Fasha Basharudin went to house No. 1154 Taman Bersatu, Jalan Kuala Kedah, Alor Setar which was occupied by the appellant, his wife (SP4) and their three children. SP5 said he identified themselves as police and requested the appellant's son

Mohd Azman Azizan, who was sleeping in the living room, to open the door which he did. Mohd Azman led SP5 and four of his team members to the main bedroom on the upper floor of the house. SP5 said he opened the room door which was unlocked and found the appellant asleep with his wife ("SP4") on the bed. Both the appellant and SP4 were searched outside the room but nothing was found on them. They were then taken back into the room and according to SP5 the room was searched in the presence of the appellant and SP4. From a drawer ("laci") in the headboard of the bed above where the appellant slept (see p. 121 appeal record) D/SM Samsudin found a white plastic bag bearing the word "Perodua" ("P8") and inside the bag SP5 found an orange coloured plastic bag with the words "terima kasih". In the orange plastic bag SP5 found a compact block of dried plant material suspected to be cannabis. SP5 also found a blue coloured plastic bag inside which was dried plant material also suspected to be cannabis wrapped in plastic and yellow cellotape. Nothing else was recovered upon a further search of the room. No search was done on the other two rooms which were occupied by the appellant's children aged 16, 20 and 24 years respectively. Both the appellant and SP4 were arrested and were then taken to the police station. SP4 was released after being remanded for eight days. SP5 took the suspected cannabis recovered from the room and kept them with him at the District Police Headquarters. He also made a search list ("P14") and lodged a police report ("P15"). SP3 the chemist who prepared the report ("P6") testified that upon her analysis she found that the materials handed over to her by SP6 ASP Balachandran were cannabis as defined under s. 2 of the Act.

[3] At the end of the prosecution's case the learned High Court judge in his grounds of judgment stated that two issues had to be determined (p. 89 appeal record) ie:

Isu-Isu Yang Perlu Diputuskan Di Akhir Kes Pendakwaan

1. Adakah tumbuhan kering itu dadah berbahaya?

2. Adakah tertuduh mengedar cannabis tersebut?

A His Lordship made the following findings:

1. Mengenai isu pertama, SP3 – Ahli Kimia mengesahkan tumbuhan-tumbuhan kering itu adalah Cannabis seberat 1,154g. Cannabis adalah dadah berbahaya seperti yang
B ditakrifkan oleh s. 2 Akta yang sama.

2. Mengenai isu kedua, dari keterangan SP4, jelas dia tiada pengetahuan dengan dadah tersebut. Bilik utama itu digunakan oleh beliau dan tertuduh sahaja. Anak-anaknya duduk di bilik yang berasingan. Dadah itu ditemui di kepala katil tempat tidur
C tertuduh. Oleh itu, tertuduh mempunyai kawalan dan milikan terhadap dadah tersebut. Dengan itu, anggapan di bawah s. 37(da)(vi) Akta Dadah Berbahaya 1952 terpakai terhadap tertuduh. Tertuduh dianggap mengedar dadah tersebut.

D 3. Oleh itu, ada kes *prima facie* terhadap tertuduh dan mahkamah memanggil tertuduh membela diri. Tertuduh memilih memberi keterangan secara bersumpah di kandang saksi selepas tiga pilihan diberi dan diterangkan kepadanya.

E **[4]** In gist, the appellant's defence was a denial of the charge. The appellant testified that it was normal for his room to be unlocked and his children had access to the room. He denied that his children would not enter his room without his permission. He denied ownership of the plastic bags and the contents. He further
F testified that he had no knowledge about the presence of the bags in the bed's headboard and did not know the owner of the bags and denied that he trafficked in the drugs found.

[5] At the end of the defence case the learned judge found as
G follows (pp. 91-92 appeal record):

1. Kes *prima facie* pendakwaan gagal disangkal oleh tertuduh;

2. Pembelaan tertuduh adalah penafian semata-mata. Dalam kes *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324
H di ms 326, Mahkamah Tinggi memutuskan:

> a mere denial without proof to reasonably dislodge the prosecution's evidence is not sufficient.

Mahkamah Persekutuan dalam kes *DA Duncan v. PP* [1980]
I 1 LNS 12 memutuskan:

> ... this denial did not cast a doubt on the prosecution case against the Appellant.

3. Pembelaan tertuduh tidak menimbulkan was-was yang munasabah (reasonable doubt);

4. *Demeanour* tertuduh semasa memberi keterangan meragukan. Keputusan kes Mahkamah Persekutuan *Khoon Chye Hin v. PP* [1961] 1 LNS 41 diikuti mengenai demeanour tertuduh;

5. Kes *prima facie* pendakwaan kekal teguh terhadap tertuduh. Pendakwaan telah membuktikan kesnya melampau keraguan yang munasabah terhadap tertuduh;

6. Tertuduh didapati bersalah dan disabitkan seperti yang diperuntukkan oleh s. 182A Kanun Tatacara Jenayah.

[6] Before us learned counsel for the appellant raised the following three issues:

(a) the learned judge failed to direct his mind to the failure of the prosecution to call the appellant's three children as witnesses;

(b) the learned judge's finding that the appellant's demeanour at the time he testified raised suspicion; and

(c) the learned judge failed to make an affirmative finding of possession.

[7] Learned counsel for the appellant submitted that the learned judge had failed to consider the evidence of SP4 that the room where the drugs were found was accessible not just to the appellant but also to SP4 and their children. The prosecution had also failed to call the appellant's children as witnesses with regard to the issue of access to the room. Counsel submitted that the failure of the prosecution to call the appellant's children as witnesses had created gaps in the prosecution's case regarding the issue of possession. It was also submitted that the learned judge's failure to properly direct his mind to the evidence regarding access to the room was a serious error which amounted to a misdirection by way of non-direction. In support learned counsel referred to the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 and *Shah Rizan Sulong lwn. PP* [2012] 1 LNS 339. Learned DPP on the other hand submitted that the non-calling of the appellant's children was immaterial as the prosecution did not rely on their evidence but on other evidence. In support of her submissions the learned DPP

relied on the case of *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386. It is further submitted that the appellant's children were offered to the defence.

[8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p. 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.

[9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

[10] With regard to the failure of the prosecution to call the appellant's children to testify, we agree with learned DPP that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial. In *Ti Chuee Hiang v. PP (supra)* the Federal Court held *inter alia*:

> ... while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfill this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

Learned DPP had submitted that the children were offered to the defence. However in *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489 the Federal Court said *inter alia* that the right of not calling

a witness by merely offering him to the defence will not be available where the prosecution evidence falls short of proving a *prima facie* case.

[11] Having perused the evidence, in our considered opinion the failure to call the appellant's children as witnesses would not have had a material effect on the prosecution's case. It would be reasonable to assume that had the children been called their testimonies regarding access to the room would in all probability be similar to the evidence of SP4; that the room was accessible to all occupants in the house.

[12] On the issue of the appellant's demeanour, learned counsel had submitted that the learned judge had failed to state in his grounds of judgment what were the factors that led him to find that the appellant's demeanour was suspicious. We have perused the grounds of judgment but we were unable to find any notation of the evaluation of the appellant's demeanour by the learned judge that led the learned judge to conclude that the appellant's demeanour was 'suspicious'. In fact no reasons were advanced by His Lordship. We are constrained to produce part of the judgment of Ismail Khan J in *Balasingham v. PP* [1959] 1 LNS 8 referred to by learned counsel wherein His Lordship said *inter alia* as follows:

> The trial court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the Appellate Court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a "speaking" judgment needs no emphasis. In fact in *Murugiah v. Public Prosecutor* and *Public Prosecutor v. Low Toh Seng* both Horne J and Terrell Ag. CJ felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial Judge in arriving at the ultimate finding.

In *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625 Arifin Zakaria, CJM (as His Lordship then was) said "... as a general rule, it is incumbent upon the court making a decision to provide reasons for its decision as litigants are entitled to the same."

[13] The learned judge's finding on the demeanour of the appellant was one of the factors that weighed on his decision to convict the appellant but we find that it was a finding that was arrived at with no supportive reasons. We respectfully adopt what Ismail Khan J said in *Balasingham v. PP (supra)* that a conclusion arrived at in the absence of reasons raises the possibility that the learned judge may not have considered the weight of evidence and the possibilities of the case in coming to his ultimate decision.

[14] Learned counsel further raised the issue that the learned judge had failed to make an affirmative finding of possession. At the risk of repetition, at the end of the prosecution case, the learned judge said amongst others as follows:

> Mengenai isu kedua, dari keterangan SP4, jelas dia tiada pengetahuan dengan dadah tersebut. Bilik utama itu digunakan oleh beliau dan Tertuduh sahaja. Anak-anaknya duduk di bilik yang berasingan. Dadah itu ditemui di kepala katil tempat tidur Tertuduh. Oleh itu, Tertuduh mempunyai kawalan dan milikan terhadap dadah tersebut. Dengan itu, anggapan di bawah Seksyen 37(da)(vi) Akta Dadah Berbahaya 1952 terpakai terhadap Tertuduh. Tertuduh dianggap mengedar dadah tersebut.

Thus the finding that the appellant had custody and control over the drugs and hence presumed to have possession was based on the fact that:

(a) only the appellant and his wife occupied the room,

(b) the drugs were found in the drawer of the headboard of the bed where the appellant slept.

[15] In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 the Federal Court said:

> It is trite law that possession is an important ingredient in the charge of trafficking. Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(da) of the Act can be invoked.

[16] The evidence showed that the drawer was closed thus the bag P8 was not visible. There was no evidence that the drawer was locked. The onus was on the prosecution to exclude, at the very least, the possibility of access by other persons to the drawer,

if not the room, and that only the appellant and no other person had exclusive access and use of the drawer. The onus was not on the defence to prove possibility of access to the drawer by others. We find that the learned judge had failed to consider that the prosecution had failed to exclude the possibility that other individuals could not have had access to the drawer. In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 Taylor J dealt with the issue of possession as follows:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

His Lordship said further:

> The word "possession" is a vague and general word which cannot be closely defined.
>
> Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

[17] On the evidence the learned judge did not specifically make a finding of actual possession for the invocation of the statutory presumption of trafficking under s. 37(da) of the Act. In the absence of other incriminating evidence against the appellant, the mere fact that the drugs were found in the drawer on the appellant's side of the bed was insufficient for the learned judge to make an inference that the appellant had exclusive custody and control over the bag P8. We agreed with learned counsel that the failure on part of the learned judge to properly consider and evaluate the evidence coupled with His Lordship's failure to make an affirmative finding of possession was a serious misdirection in law.

[18] Be that as it may, the learned judge had called on the appellant to enter his defence. It is trite that all that is necessary is for the appellant in his defence to cast a reasonable doubt in the prosecution's case to earn an acquittal. The appellant's defence is a denial. In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 the Supreme Court held *inter alia* as follows:

A Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 examine whether even though the Court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the Judge but rather the actual application of the test to the facts of the case. In this case, the learned Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[19] The learned judge had set out the defence (p. 91 appeal record). However we find that the defence as set out was not with a view of assessing it nor is there any indication that the learned judge had tested the defence by comparing it with the evidence adduced by the prosecution in coming to his conclusion that the defence had failed to cast a reasonable doubt on the prosecution case.

[20] The burden on the prosecution throughout is to prove their case beyond a reasonable doubt. At the end of the prosecution's case the test is "*prima facie* case" based on a maximum evaluation of evidence. In *Magendran Mohan v. PP* [2011] 1 CLJ 805 Alauddin Mohd Sheriff PCA said:

> The test at the end of the prosecution's case is "*prima facie* case" based on a maximum evaluation of evidence. The evidence has to be scrutinized properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

In the present appeal it is our considered opinion that had the learned judge properly evaluated the evidence adduced by the prosecution, he would have come to a finding that the prosecution had failed to prove beyond a reasonable doubt that the appellant had custody or control of the bag containing the drugs in question for the presumption under s. 37(da) of the Act to be invoked. We were of the view that the appellant ought not to have been called to enter his defence.

[21] It is the duty of the appellate court to step in where errors of law are apparent on the face of the record which resulted in serious and substantial miscarriage of justice to the accused. In the present appeal we find that the balance of evidence is grossly against the conviction of the accused. For the reasons stated above we allowed the appellant's appeal and set aside the conviction and sentence. The appellant was thereupon acquitted and discharged.

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